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9 **IN THE UNITED STATES DISTRICT COURT FOR**  
10 **THE CENTRAL DISTRICT OF CALIFORNIA**

11  
12 **XINGFEI LUO,**

13 Petitioner,

14 **v.**

15  
16 **THE STATE OF CALIFORNIA,**

17 Respondent.  
18

Case No. 8:22-cv-01640-MEMF-KES  
**SUPPLEMENTAL RESPONSE TO  
AMENDED PETITION FOR WRIT  
OF HABEAS CORPUS**

Judge: The Honorable Karen E.  
Scott

Action Filed: 9/06/2022

19 **SUPPLEMENTAL RESPONSE ADDRESSING PETITIONER'S CLAIM**  
20 **THIRTY-FIVE**

21 **INTRODUCTION**

22 As noted in Respondent's Memorandum, after breaking up with Tomas C.,  
23 Petitioner Xingfei Luo engaged in a campaign of revenge porn, violated court  
24 orders to cease, and ended up convicted of vandalism, violation of a protective  
25 order, and unlawful dissemination of private photos and recordings. Following  
26 briefing by both parties on Luo's amended federal habeas corpus Petition, this  
27 Court requested clarification on the legal basis of Luo's thirty-fifth claim for  
28 relief—which concerned an alleged instructional error about the prosecution's

1 theory of the manner in which she violated her court order. Luo clarified that, in  
2 addition to her due process argument, this claim also seeks relief on the basis of  
3 ineffective assistance by both her trial and appellate counsel. Based on this  
4 clarification, the Court invited supplemental briefing from Respondent on this  
5 claim.

6 In addition to being procedurally defaulted, Luo's argument does not warrant  
7 relief, whether evaluated as a due process or ineffective assistance claim. The  
8 instructions provided by the court informed the jury of the essential elements of the  
9 offense, and did not lessen the prosecution's burden of proof to Luo's detriment.  
10 The instructions did not violate Luo's federal due process guarantee and altering  
11 them could not have resulted in a more favorable trial outcome for her. For the  
12 same reasons, her attorneys did not perform deficiently in declining to raise the  
13 argument she now seeks to advance. Likewise, Luo's cannot meet her burden to  
14 show that her complaints about the performance of counsel prejudiced the outcome  
15 of her trial.

16 Like all her other claims, the thirty-fifth claim of Luo's amended Petition  
17 should be denied and dismissed with prejudice.

## 18 ARGUMENT

### 19 I. LUO'S CLAIM THAT THE TRIAL COURT GAVE AN INAPPLICABLE JURY 20 INSTRUCTION REGARDING HER RESTRAINING ORDERS (CLAIM 35) DOES 21 NOT WARRANT FEDERAL HABEAS RELIEF

22 Luo alleges that the trial court provided a jury instruction that was unrelated to  
23 the manner in which she was charged with violating her restraining orders. (ECF  
24 Doc. 33 at 103.) Specifically, she faults the court for providing an instruction that  
25 tracked the language of the prosecution's initial complaint (violating order not to  
26 contact or disturb the victim) rather than the theory the prosecutor ultimately used  
27 under the amended information (Luo's violation of the court order to remove the  
28 victim's private photographs she posted online). (ECF Doc. 33 at 103; ECF Doc. 3

1 at 159, 172-173 [CT 146, 159-160].) Luo subsequently clarified that the federal  
2 basis for these claims is twofold. First, she alleges that the complained-of  
3 instruction violated her constitutional right to due process. (ECF Doc. 60 at 1-2.)  
4 Second, she argues that her trial counsel rendered constitutionally ineffective  
5 assistance in failing to object to, or otherwise seek to correct, the given instruction  
6 and her state appellate counsel failed to raise the error on appeal. (ECF Doc. 60 at  
7 3.)

8 Neither argument entitles her to relief. At the outset, the claim is, as noted in  
9 Respondent's Memorandum, procedurally defaulted. But even on the merits, it  
10 fails. The instructions did not violate federal law, did not lower the prosecution's  
11 burden of proof, and did not otherwise disadvantage Luo or mislead the jury  
12 regarding the essential elements of the charged offense. Furthermore, any supposed  
13 instructional deficiency under state law would not raise a federal question  
14 cognizable here, and could not have affected the outcome or resulted in a more  
15 favorable verdict for Luo. Consequently, Luo cannot show deficient performance  
16 by either her trial or appellate counsel in failing to raise this issue, and regardless,  
17 any shortcomings in their representation were not prejudicial. Viewed under either  
18 standard, the California Supreme Court did not err in summarily denying this claim  
19 (Lodgment 7) because it does not warrant habeas relief.

20 **A. Luo's claim is procedurally defaulted**  
21

22 Federal courts "will not review a question of federal law decided by a state  
23 court if the decision of that court rests on a state law ground that is independent of  
24 the federal question and adequate to support the judgment." *Coleman v. Thompson*,  
25 501 U.S. 722, 729 (1991). The independent and adequate state ground doctrine  
26 "applies to bar federal habeas when a state court declined to address a prisoner's  
27 federal claims because the prisoner had failed to meet a state procedural  
28 requirement." *Id.* at 729-730. Consequently, "[i]n all cases in which a state

1 prisoner has defaulted his federal claims in state court pursuant to an independent  
2 and adequate state procedural rule, federal habeas review of the claims is barred  
3 unless the prisoner can demonstrate cause for the default and actual prejudice as a  
4 result of the alleged violation of federal law, or demonstrate that failure to consider  
5 the claims will result in a fundamental miscarriage of justice.” *Id* at 750.

6 As previously explained in Respondent’s original Memorandum, Luo failed  
7 to raise the instructional error claim she now asserts through her initial state habeas  
8 petition, instead opting to assert it through successive and piecemeal habeas  
9 petitions. (Lodgment 2 at 4-5.) Accordingly, this claim is procedurally barred  
10 under the independent and adequate “*Clark*” rule. *See In re Clark*, 5 Cal. 4th 750,  
11 767-768 (Cal. 1993) (“the court will not consider repeated applications for habeas  
12 corpus presenting claims previously rejected. The court has also refused to consider  
13 newly presented grounds for relief which were known to the petitioner at the time  
14 of a prior collateral attack on the judgment.”); *In re Morgan*, 50 Cal. 4th 932, 945  
15 (Cal. 2010) (“A corollary of the rule against successive petitions is the rule that all  
16 known claims must be brought in a single, timely habeas corpus petition.”).

17 As further detailed below, Luo has provided no satisfactory justification to  
18 excuse her default because she cannot show that she received ineffective assistance  
19 from appellate counsel based on her attorney’s failure to raise the claim on direct  
20 appeal. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (To establish “cause” a  
21 petitioner must “show that some objective factor external to the defense impeded  
22 counsel’s efforts to comply with the State’s procedural rule.”) Nor can she show  
23 prejudice because her argument is meritless, both as a due process and an  
24 ineffective assistance of counsel claim. *Coleman*, 501 U.S. at 750.

25 ///

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**B. Luo's due process claim is meritless**

As previously explained in Respondent's original Memorandum, Luo's claim of instructional error does not warrant habeas relief on the basis of an alleged violation of her federal due process rights.

The constitution prohibits governmental deprivation of life, liberty or property without due process of law. U.S. Const. amends. V, XIV. This protection has been applied in the context of alleged instructional error. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 71-73 (1991); *Boyde v. California*, 494 U.S. 370, 380, (1990). However, "[e]ven if there is some 'ambiguity, inconsistency, or deficiency' in the instruction, such an error does not necessarily constitute a due process violation." *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) ("[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional right]") Thus, "the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief." (*Estelle*, 502 U.S. at 71-72; *Gilmore v. Taylor*, 508 U.S. 333, 343-344 (1993). Rather, the defendant must show that "there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington*, 555 U.S. at 191 (*citing Estelle*, 502 U.S. at 72.). In making this determination, the pertinent question is " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' " *Id.*

In this case, the prosecutor and defense counsel both informed the jury—consistent with the amended information—that Luo was alleged to have violated the temporary restraining order and domestic violence restraining order by violating the injunction to deactivate websites containing private photographs of the victim and refrain from further posting such images online. (ECF Doc. 3 at 79 [CT 66]; ECF Doc. 4 at 23-25, 171-173, 175, 178-179 [RT 122-124, 270-272, 274, 277-

1 278].) In addition, the parties stipulated, in relevant part, that the lawful temporary  
2 and permanent restraining orders included the following terms: “Ms. Luo is to stop  
3 posting online content about [the victim] and his company Gorgeous Painting;”  
4 “Ms. Luo is to remove content on the Internet relating to video, pictures, blogs, or  
5 websites about [the victim] created by Ms. Luo;” “Ms. Luo is to stop posting the  
6 picture or likeness of [the victim], or refer to him by name on any social media  
7 website or blog;” and “ Ms. Luo is to remove any pictures or references of [the  
8 victim] from any social media website or blog that she posted.” (ECF Doc. 4 at  
9 119-120 [RT 218-219].) As such, there is no reasonable probability that the jurors  
10 misunderstood their duties or the nature of their inquiry to Luo’s detriment.

11 Furthermore, even if Luo could have demonstrated that the jury instructions  
12 were somehow deficient, she cannot show a violation of federal law. As noted, an  
13 erroneous instruction in a criminal trial violates due process only where it fails to  
14 give effect to the requirement that the State must prove every element of a charged  
15 offense. *Estelle*, 502 U.S. at 71-72. Here, the trial court’s instruction to the jury  
16 included all essential elements of California Penal Code section 273.6(a), and  
17 specifically advised the jurors that the People must prove that Luo willfully violated  
18 the court’s written protective order, lawfully issued under the Domestic Violence  
19 Prevention Act. (ECF Doc. 3 at 159, 172-173 [CT 146, 159-160]); *see also* Cal.  
20 Penal Code § 273.6; Judicial Council of California Criminal Jury Instruction 2701.  
21 Therefore, any error in the instructions did not alleviate the prosecution’s burden of  
22 proof, and thus did not implicate federal due process guarantees.

23 Finally, even if the complained-of instructions failed to inform the jury  
24 regarding an essential element of a criminal offense, no prejudice occurred. When  
25 jury instructions have omitted an essential element of an offense, the error does not  
26 require reversal (even under the more onerous direct appeal standard) where “the  
27 omitted element was uncontested and supported by overwhelming evidence.”  
28 *Neder v. U.S.* 527 U.S. 1, 17 (1999). Here, the parties stipulated that the state court

1) issued lawful orders requiring Luo to refrain from further posting images of the victim online and to remove those she had already posted, and 2) informed Luo of her obligations. (ECF Doc. 4 at 118-120 [RT 217-219].) The evidence conclusively established that Luo failed to comply with these orders, as nude photos and videos of the victim posted by Luo remained on multiple websites even up to the time of trial. (ECF Doc. 4 at 80-92 [RT 179-191].) All told, the evidence supporting this element was uncontested and overwhelming. Therefore, even if there was an instructional error that somehow rose to a constitutional deprivation, Luo has failed to sustain her burden to demonstrate a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 637. Luo is not entitled to relief or further evidentiary development. *Pinholster*, 563 U.S. at 181.

**C. Luo's ineffective assistance of counsel claims are equally meritless**

Luo's claim fares no better when viewed through the lens of ineffective assistance. In order to establish that counsel was ineffective, Luo bears the burden of showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). In considering the first prong of the test, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. As to the second prong, a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Under § 2254(d), "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. . . . A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. 86,



1 101 (2011). Thus, a federal habeas court must use “a ‘doubly deferential’ standard  
2 of review that gives both the state court and the defense attorney the benefit of the  
3 doubt.” *Burt v. Titlow*, 571 U.S. 12, 15 (2013; see *Dunn v. Reeves*, 141 S. Ct. 2405,  
4 2411 (2021) (per curiam) (federal court may grant relief only if “every ‘fairminded  
5 juris[t]’ would agree that every reasonable lawyer would have made a different  
6 decision”) (emphasis in original).

7 Luo cannot satisfy either prong of *Strickland*. She alleged that her trial  
8 counsel abrogated their duties of competent representation by failing to object to or  
9 attempt to correct the complained-of instructional error. (ECF Doc. 60 at 3.) Here,  
10 however, it is crucial to remember that the prosecution’s strongest case that Luo  
11 violated her court order was based on evidence that she refused to remove the  
12 victim’s private photographs she posted online, rather than that she continued to  
13 contact or disturb the victim after the court order. (ECF Doc. 4 at 23-25, 80-92,  
14 171-173, 175, 178-179 [RT 122-124, 179-191, 270-272, 274, 277-278].)  
15 Consequently, any inaccuracy or incompleteness in the court’s given instruction  
16 was actually favorable to the defense, as it did not provide specific details on the  
17 prosecution’s strongest theory of her guilt. (ECF Doc. 3 at 79, 159 [CT 66, 146];  
18 ECF Doc. 33 at 103.)

19 Counsel’s decision whether or not to object is inherently a tactical choice,  
20 entitled to a high degree of deference by the reviewing court. *United States v.*  
21 *Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991); *Larimer v. Yates*, 483 F. App’x 317,  
22 319–20 (9th Cir. 2012); accord *Lundgren v. Mitchell*, 440 F.3d 754, 774 (6th Cir.  
23 2006) (usually, “defense counsel must so consistently fail to use objections, despite  
24 numerous and clear reasons for doing so, that counsel’s failure cannot reasonably  
25 have been said to have been part of a trial strategy or tactical choice.”) Understood  
26 in context, Luo’s trial counsel may have reasonably determined that foregoing an  
27 objection to the offered instructions provided her with a greater chance of obtaining  
28 an acquittal—to which double jeopardy protections would have attached regardless



1 of any instructional error. *See United States v. Martin Linen Supply Co.*, 430 U.S.  
2 564, 571 (1977) (“Perhaps the most fundamental rule in the history of double  
3 jeopardy jurisprudence has been that ‘[a] verdict of acquittal . . . could not be  
4 reviewed, on error or otherwise’ ”). Alternatively, counsel may have simply  
5 determined that, because the offered instruction provided a correct statement of  
6 substantive law regarding the elements of the offense, no further clarification was  
7 required. *See Bashor v. Risley* (9th Cir. 1984) 730 F.2d 1228, 1241 (counsel’s  
8 decision not to object to jury instruction, even if incorrect in hindsight, does not rise  
9 to ineffective assistance where counsel acted out of tactics rather than ignorance).  
10 In any event, it cannot be said that counsel’s conduct was objectively unreasonable  
11 beyond fair-minded disagreement or that such actions had no conceivable strategic  
12 purpose. *See Strickland*, 466 U.S. at 687-689; *Dunn*, 141 S. Ct. at 2411.

13 Luo has also failed to show that her trial counsel’s representation prejudiced  
14 her. *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) (“An ineffective assistance of  
15 counsel claim based on counsel’s failure to object to a jury instruction requires a  
16 showing of prejudice”). As explained above, the evidence proving that Luo  
17 violated a valid court order to remove nude photographs of the victim from the  
18 internet was uncontested and overwhelming, meaning that any instructional error  
19 was harmless. Given this, it strains credulity to suggest that Luo could have  
20 obtained a more favorable verdict if her counsel had sought further instruction  
21 regarding the prosecution’s most compelling theory of her guilt. Consequently,  
22 Luo cannot show that any supposed ineffective assistance was prejudicial, and is  
23 therefore not entitled to relief.

24 Luo’s argument regarding the representation of appellate counsel is similarly  
25 unavailing. (*See* ECF Doc. 60 at 3.) After reviewing the record, Luo’s appellate  
26 counsel identified no meritorious issue to raise on appeal, and followed the standard  
27 California procedures established in *People v. Wende*. (ECF Doc. 3 at 3-4; ECF  
28 Doc. 33 at 102; Lodgment 2 at 5-6.) As noted in Respondent’s Memorandum,

1 California's *Wende* procedures provide the safeguards necessary to constitute  
2 adequate and effective appellate review, and Luo must prove that counsel's choice  
3 to file a *Wende* brief was objectively deficient and prejudicial. *Smith v. Robbins*,  
4 528 U.S. 259, 276, 278-279, 284-286 (2000). Here, defense counsel's decision to  
5 refrain from challenging the given instructions was not without conceivable tactical  
6 purpose, and Luo's conviction for violating a court order was a foregone conclusion  
7 in light of overwhelming and undisputed evidence that she disobeyed her obligation  
8 to take down the photos she had posted online. Accordingly, appellate counsel did  
9 not render deficient representation or prejudice Luo by declining to pursue a futile  
10 argument. *See Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017)  
11 ("Effective appellate counsel should not raise every nonfrivolous  
12 argument on appeal," but instead is only required to present arguments "most likely  
13 to succeed."). For the same reasons, Luo's accusation of ineffective assistance  
14 cannot excuse her procedural default of this claim. *Id.* at 2064-2065 (claim of  
15 attorney error that does not violate the Constitution is attributed to the prisoner.).

## 16 CONCLUSION

17 This Court should dismiss the Amended Petition with prejudice and deny a  
18 certificate of appealability.

19 Dated: May 23, 2024

Respectfully submitted,

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23 /s/ Michael D. Butera

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## CERTIFICATE OF SERVICE

Case Name: **Luo v. The People of the State  
of California**

No. **8:22-cv-01640-MEMF-KES**

I hereby certify that on May 23, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

### **SUPPLEMENTAL RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On May 23, 2024, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Xingfei Luo  
P.O. Box 4886  
El Monte, CA 91734  
In Pro Per

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 22, 2024, at San Diego, California.

R. Pencheff  
Declarant



Signature